

² 5 U.S.C. § 8101 *et seq.*

On appeal appellant asserts that he continues to be disabled due to employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

OWCP accepted that on January 18, 1989 appellant, then a 37-year-old maintenance worker, sustained an employment-related low back strain with subluxations. Appellant was off work until April 26, 1989 when he returned to light duty. He continued working light duty until April 5, 1990 when he slipped on a rock and slid down a slope at work. OWCP accepted this claim for a herniated disc at L4-5.⁴ Appellant returned to light duty on September 10, 1990 and resigned his position on September 13, 1990. On October 10, 1997 he filed a recurrence of disability claim (Form CA-2a) alleging that the recurrence began in 1989. Appellant indicated that he was unable to perform light-duty work due to chronic back pain and clinical depression. By decision dated September 29, 1998, OWCP denied the recurrence of disability claim. In a July 14, 1999 decision, a hearing representative with OWCP's Branch of Hearings and Review affirmed the September 29, 1998 decision.

On November 8, 1999 appellant requested reconsideration. On December 2, 1999 OWCP accepted a recurrent herniated disc at L4-5. Appellant elected to receive FECA benefits, effective May 19, 1996. OWCP paid retroactive compensation beginning that day, and placed him on the periodic compensation rolls.

In November 2011 OWCP referred appellant to Dr. Mitchell A. Weinstein, Board-certified in neurosurgery, for a second opinion evaluation. Dr. Weinstein provided a comprehensive report dated December 7, 2011 in which he described the employment injury, a review of the medical evidence, and physical examination findings. He advised that appellant had no employment-related residuals. In a January 11, 2012 supplemental report, Dr. Weinstein indicated that, while appellant had physical restrictions, these were not related to his employment injuries.

By decision April 16, 2012, OWCP found the weight of the medical evidence rested with the opinion of Dr. Weinstein and terminated appellant's wage-loss compensation and medical benefits, effective April 17, 2012. On April 27, 2012 appellant requested reconsideration. By decision dated July 25, 2012, OWCP denied modification of the prior decision.⁵ Appellant again requested reconsideration, and in a decision dated September 5, 2012, OWCP denied his reconsideration request. Appellant next requested reconsideration on February 7, 2013. By decision dated May 21, 2013, OWCP denied modification of the prior decisions as the medical evidence submitted was of insufficient probative value.

³ Docket No. 14-1241 (issued June 22, 2015). See discussion *infra*.

⁴ OWCP adjudicated the 1989 claim under its File No. xxxxxx776 and the 1990 claim under File No. xxxxxx702. The claims were combined, with File No. xxxxxx776 becoming the master file.

⁵ OWCP initially issued a decision on July 23, 2012, that was superseded by the July 25, 2012 decision.

Appellant appealed to the Board on June 10, 2013. By order dated December 18, 2013, the Board remanded the case to OWCP because the case record transmitted to the Board did not contain a surveillance DVD which was relevant to the case. The Board directed OWCP to obtain the DVD and to issue a *de novo* decision.⁶ Two DVDs were thereafter obtained by OWCP. In a merit decision dated January 9, 2014, OWCP again reviewed the evidence of record and denied modification of the prior decisions. Appellant again appealed to the Board on May 5, 2014.

By decision dated June 22, 2015, the Board found that OWCP properly determined that the weight of the medical evidence rested with the opinion of Dr. Weinstein and, therefore, met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 17, 2012. The Board further found that the medical evidence submitted was insufficient to meet appellant's burden of proof to establish that he had continuing residuals of the accepted lumbar conditions on or after April 17, 2012.⁷

Appellant requested reconsideration on June 27, 2016.⁸ He submitted evidence previously of record, including reports from his attending Board-certified neurosurgeon, Dr. Thomas J. Purtzer, and Dr. Weinstein's reports. The record also includes a February 23, 2016 treatment note from a physician assistant, as well as a lumbar bone scan showing mild degenerative changes at L3-4 and degenerative facet joint changes.

By decision dated September 14, 2016, OWCP denied appellant's reconsideration request because the evidence submitted was irrelevant or immaterial and thus insufficient to warrant merit review.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁹

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a). As one such limitation, section 10.607(a) of its regulations provides that an application for reconsideration must be received by OWCP within one year of the date of OWCP's decision for which review is sought.¹⁰

⁶ Docket No. 13-1474 (issued December 18, 2013).

⁷ *Supra* note 3.

⁸ Although appellant claimed to be filing a request for reconsideration from the Board's June 22, 2015 decision, OWCP is not authorized to review Board decisions. The decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d). Although the June 22, 2015 Board decision was the last merit decision, the January 9, 2014 OWCP decision is the appropriate subject of possible modification by OWCP.

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.607(a).

OWCP procedures require a review of the file to determine whether the application for reconsideration was received within one year of a merit decision. The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board, but does not include prerecoupment hearing decisions.¹¹ Timeliness is determined by the document receipt date of the reconsideration request (the received date in the Integrated Federal Employee's Compensation System). If the request for reconsideration has a document received date greater than one year, the request must be considered untimely.¹²

OWCP will consider an untimely application only if the application demonstrates clear evidence of error on the part of it in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹³ The term clear evidence of error is intended to represent a difficult standard. If clear evidence of error has not been present, OWCP should deny the application by letter decision, which includes a brief evaluation of the evidence submitted and a finding made that clear evidence of error has not been shown.¹⁴

ANALYSIS

The Board finds that this case is not in posture for decision and must be remanded to OWCP for the application of the appropriate standard of review.¹⁵

An application for reconsideration must be received by OWCP within one year of the date of a merit review of the claim, including any merit review by the Board.¹³ The last merit decision of record was the Board's June 22, 2015 decision. Appellant's reconsideration request was received on June 27, 2016. In a September 14, 2016 decision, OWCP denied appellant's request finding that he had failed to submit evidence sufficient to warrant merit review.

The Board finds that in its September 14, 2016 decision, OWCP erroneously applied the standard of review for a timely request for reconsideration as set forth at sections 10.605 through 10.607 of its regulations. The last merit decision of record was the Board's June 22, 2015 decision. As more than one year had elapsed from the last merit decision to the filing of appellant's request for reconsideration on June 27, 2016, OWCP should have applied the clear evidence of error legal standard.¹⁶ This is the appropriate standard for cases in which a reconsideration request is untimely filed.¹⁷ OWCP must undertake a limited review to determine

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016).

¹² *Id.*

¹³ *Id.* at Chapter 2.1602.5a (February 2016); *J.S.*, Docket No. 16-1240 (issued December 1, 2016).

¹⁴ *Id.* at Chapter 1.1602.5b.

¹⁵ *See E.B.*, Docket No. 16-0146 (issued June 1, 2016).

¹⁶ *T.E.*, Docket No. 16-0574 (issued August 18, 2016).

¹⁷ *P.L.*, Docket No. 17-0146 (issued October 24, 2017).

whether the application demonstrates clear evidence that the final merit decision was in error.¹⁸ However, in the case at hand, OWCP erroneously reviewed the evidence under the standard for timely reconsideration requests pursuant to section 8128(a) of FECA and section 10.606(b)(3) of OWCP regulations.¹⁹ As such, the Board will remand the case to OWCP for application of the standard for reviewing an untimely request for reconsideration as set forth at section 10.607(b) under the more stringent clear evidence of error standard.

Following this and any further development deemed necessary, OWCP shall issue an appropriate decision.

CONCLUSION

The Board finds this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the September 14, 2016 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: January 25, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁸ See *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁹ *Supra* note 16.